Office of Chief Counsel
Internal Revenue Service
Memorandum
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Director, Technical Services, Office of Appeals
Attn: Janis Suchyta, Appeals Tax Policy and Procedures

from: Mitchel S. Hyman
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subject: Trust Fund Recovery Penalties: Proving Issuance and Receipt of Letters 1153

The purpose of this memorandum is to provide advice concerning verification of assessments made under section 6672 of the Internal Revenue Code (often referred to as the Trust Fund Recovery Penalty, or TFRP) in CDP cases. On January 13, 2009, our office sent you a memorandum addressing how appeals officers and settlement officers (AO/SO) in CDP cases should verify the validity of assessments based on defaulted notices of deficiency. This year the Tax Court issued an opinion in Mason v. Commissioner, 132 T.C. No. 14 (2009), a CDP case addressing the evidence required to prove that a preassessment penalty notice was mailed and received by the taxpayer. Mason highlights the importance of Appeals ensuring that the record includes adequate proof of mailing of the preassessment notice of proposed liability (Letter 1153) to satisfy the verification requirement under section 6330(c)(1) and adequate proof that the taxpayer received Letter 1153 before precluding consideration of the underlying section 6672 liability under section 6330(c)(2)(B).

1. Section 6672 Trust Fund Recovery Penalty and Preassessment Procedures

As stated in our prior memorandum, Appeals must verify the validity of the assessments and explain what records or evidence it relied on in fulfilling this duty, regardless of whether taxpayer is raising any issues involving the validity of assessments, and regardless of whether the taxpayer is contesting liability. I.R.C. §§ 6330(c)(1) and (c)(3)(A); 6320(c). The prerequisites for assessment of the TFRP are set out in section 6672. Section 6672(a) provides that a person required to collect, account for, and pay over taxes who willfully fails to do so or who willfully attempts to evade or defeat any such tax shall be liable for a penalty equal to the total amount of tax evaded, not collected, or not accounted for and paid over. These taxes consist of employment taxes that were withheld or should have been withheld from employees' wages (and were not paid) or excise taxes that were or should have been collected (and were not paid), and they are commonly referred to as "trust fund taxes."

Section 6672(b) provides that no penalty may be imposed unless the Secretary notifies the person in writing by delivering in person or by mailing to the taxpayer's last known address a notice that explains that the taxpayer shall be subject to the TFRP assessment. Additionally, the notice must precede any notice and demand for payment of the section 6672 penalty by at least 60 days.[1] The statute does not require that the Service mail Letter 1153 by certified mail. The IRM, however, recommends that the Service deliver it in person or use certified mail. See IRM 5.7.4.7. These notice procedures do not apply if the Secretary finds that the collection of the section 6672 penalty is in jeopardy. I.R.C. § 6672(b)(4). They also do not apply if the taxpayer signed Form 2751, Proposed Assessment of Trust Fund Recovery Penalty, agreeing to the assessment.

As is the case with a notice of deficiency, a Letter 1153 mailed to a taxpayer's last known address is valid, irrespective of actual receipt. Congress added the notice requirement to section 6672 in 1996. See Taxpayer Bill of Rights 2, Pub.L. 104-168, sec. 901(a), 110 Stat. 1465 (1996) (amending section 6672 to include the preliminary notice requirement at section 6672(b)). Hence, the notice requirement is effective only for assessments made after June 30, 1996.

A trust fund recovery penalty assessment is therefore valid if the Service sent a Letter 1153 to a taxpayer's last known address and assessed the section 6672 penalty more than 60 days after mailing it and within the period for assessment established by section 6501(a). Section 6501(a) generally provides a 3-year period of limitations for assessment after the return is filed. The TFRP can be assessed against a responsible person within the period of limitations commenced by the filing of the employer's Form 941. Thus, it generally must be assessed within the 3-year period following the statutory date on which the Form 941 is deemed filed (April 15 of the succeeding calendar year). See I.R.C. § 6501(b)(2). When the Letter 1153 is issued before the expiration of the assessment statute, the statute will not expire before the date 90 days after the 60-day notice was mailed. See I.R.C. § 6672(b)(3). If the Service issues the Letter 1153 before the expiration of the period of limitation under section 6501(a), the assessment period will not expire before the later of: (A) the date 90 days after the date on which the notice is mailed or delivered in person, or (B) if there is a timely protest of the proposed assessment, 30 days after the Service makes a final administrative determination with respect to the protest. I.R.C. § 6672(b)(3)(A) and (B). Typically, the taxpayer's last

[1] Note in this regard that the statute requires 60-day notice before notice and demand, rather than 60 days before assessment. In imposing a tax liability, first the Service makes the assessment under section 6203 (the assessment is the act of recording the liability in the Service's records), and then follows up with notice and demand which must be given within 60 days of the assessment under section 6303. In practice, the statutory notice and demand is sent to the taxpayer at the same time the assessment is made. Since notice and demand cannot be given until after assessment, and in light of the extension of the statute of limitations on assessment in section 6672(b)(3), we interpret this statutory scheme as prohibiting assessment for the 60-day period following issuance of the Letter 1153.

known address is the address listed by the taxpayer on his or her most recently filed return before the Letter 1153 was issued. If the Service did not send the Letter 1153 to the taxpayer's last known address, the resulting assessment is generally invalid (and collection cannot proceed).[2]

A Letter 1153 informs the "responsible person" of the Service's efforts to collect the taxes due from the business have not resulted in full payment of the liability and therefore proposes to assess a penalty against him or her as a person required to collect, account for, and pay over withheld taxes for the business. The person has the right to appeal (protest) this proposed action to the Appeals Office by mailing to Appeals a written appeal within 60 days from the date of the Letter 1153 (75 days if the Letter 1153 is addressed to a person outside the United States).[3] If the person does not timely respond within 60 days from the date of the Letter 1153 (or 75 days if outside the United States), the Service can assess the penalty and begin collection action.[4]

2. Verifying the Proper Mailing of Letter 1153

Appeals may generally rely on transcripts showing the section 6672 penalty assessments were made in order to verify that these assessments were properly made. However, when the taxpayer denies receiving the Letter 1153 or claims that one was not issued, Appeals must inquire into whether the letter 1153 was properly issued. Appeals must obtain the section 6672 files, examine the documentation establishing mailing of the letter, and explain in the notices of determination what the AO/SO relied upon in determining that the assessments were properly made.[5]

Thus, in all cases the AO/SO should ask the taxpayer if he or she received the Letter 1153 and document the response. This inquiry should become standard practice because of the importance of verifying the validity of the section 6672 assessments and the fact that proof of issuance and delivery of the Letter 1153 is readily available to the AO/SO in the section 6672 files if the taxpayer denies receiving the Letter 1153.[6] Also,

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[2] If the taxpayer actually received a letter that was not mailed to the last known address, however, the assessment may be valid; counsel should be consulted in such situations.
[3] If the taxpayer and Appeals disagree after the protest conference, the taxpayer has no right to judicial review of the adverse determination. However, the taxpayer may file an administrative refund claim with the Service, pay a portion of the tax liability equal to the withholding tax of one employee for one taxable period, and then if the claim is disallowed or six months elapse without a determination with respect to the claim, file a refund suit.
[4] The 60-day period (or 75-day period, if applicable) is measured from the mailing date of the Letter 1153.
[5] We note that there is no action code in IDRS for the Letter 1153, so the issuance of the letter will not show up on IRS transcripts.
[6] Asking the receipt question and documenting the response has several benefits. An affirmative response will help Appeals verify the assessment as well as determine the separate issue of whether the taxpayer is precluded from raising liability during the CDP

as part of the AO/SO's standard verification duties, in all cases in which a taxpayer denies receiving the Letter 1153 or claims one was not issued, the AO/SO should obtain the section 6672 files and examine the proof of issuance and delivery.

Appeals therefore should take the following steps:

a. Inquire. As standard procedure, ask the taxpayer if he or she received the Letter(s) 1153 upon which the section 6672 assessments are based and document the taxpayer's response.

b. Document acknowledgements of receipt. If the taxpayer informs Appeals verbally, or in correspondence, that he or she received the Letter 1153 or is not contesting its issuance, put this acknowledgement in the case history notes and in the notice of determination as verification that the Service sent it.

c. Obtain the section 6672 files if the taxpayer claims the Letter 1153 was not issued, or was not received. Do not solely rely on tax transcripts showing the making of a timely assessment.[7] The AO/SO should examine a copy of the Letter 1153, and either (1) evidence of the Service's in-person delivery of the Letter 1153 (including ICS histories) or (2) copies of the certified mailing lists (CMLs), if any, in addition to the transcripts regarding the taxpayer's last known address at the time the Letter 1153 was sent. Besides a CML, proof of mailing may include, if available, delivery information obtained from the Postal Service. If copies of some of the underlying documents cannot be located, for example, the letter or the certified mailing list (or other proof of mailing), counsel should be consulted regarding whether there is otherwise sufficient proof of the proper mailing of the letter 1153.

d. Document and explain all required verification determinations. If Appeals determines that the Letters 1153 were issued to the taxpayers and the Service followed all required procedures, Appeals must document its efforts in making these determinations in its case notes and explain in its notices of determination how it arrived at this determination. Boilerplate statements that all procedures were followed are inadequate.

3. Proving Receipt of Letter 1153 to Preclude Raising Liability in CDP Cases

When a taxpayer denies receiving Letter 1153, this raises two separate issues: whether

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hearing. Also, as discussed in our prior memorandum, under Hoyle v. Commissioner, 131 T.C. No. 13 (2008), there is always the risk if the receipt issue is not discussed at the CDP hearing, it may be raised in court and the case remanded if adequate documentation is not in the record. Asking the question up front may avoid remand.

[7] If the taxpayer does not remember whether he or she received the Letter 1153, or otherwise does not affirmatively admit receiving it, the best practice would be to obtain the section 6672 files and investigate further as outlined in this memorandum.

the letter was properly issued, and whether a taxpayer received the Letter 1153. If we determine that the letter was not properly issued, the assessment is not valid and collection cannot proceed. If we determine that the letter was properly issued, if the taxpayer is raising the merits of his liability for the penalty, we still must determine whether the taxpayer actually received the letter, and so has no right to raise liability. If taxpayers received Letter 1153 they had a prior opportunity to dispute the underlying section 6672 liability and cannot raise it in their CDP cases. I.R.C. § 6330(c)(2)(B).

It is important to note that the bar on liability addresses Appeals' statutory obligation to consider liability. Even where the review of liability is legally precluded, Appeals may, in its discretion, consider liability, [redacted].[8]

In instances where the Service used the mail to deliver the Letter 1153, if a taxpayer has not acknowledged receiving it, the AO/SO should ask the taxpayer whether he or she received it and document the response. [redacted]

In some cases, the Postal Service has returned to the Service as "unclaimed" the unopened original envelope containing the Letter 1153. Although the taxpayer has not actually received the Letter 1153 in this situation, the Letter 1153 can be deemed received (and thus precludes liability issues from being raised in the CDP case) if the AO/SO determines based on the facts that the taxpayer refused to accept delivery or took deliberate steps to thwart delivery. For example, the taxpayer admits to receiving

[8] We also note that there may be circumstances where, although taxpayer received the letter and requested and filed a timely protest, taxpayer did not nonetheless have a prior opportunity because a proper hearing was not provided to the taxpayer. For example, the protest was misplaced and taxpayer was never given an appeals conference. Although the lack of a proper hearing would not invalidate the assessment, it would entitle the taxpayer to raise liability in the CDP case. We finally note that if a protest was timely filed, a hearing properly held and a written administrative determination issued, the written determination would ordinarily be conclusive that liability is precluded from being raised in the CDP case.

the USPS Form 3849 but failed to pick up the certified mail containing the Letter 1153. On the other hand, the AO/SO could determine that there was no deemed receipt based on all the evidence (and thus liability issues can be raised in the CDP case). [redacted] It is important in these situations to explain in the notice of determination and include in the record the evidence the AO/SO considered in making these determinations.

[redacted]

Conclusion

We would be happy to work with your office to revise the current Part 8 IRM provisions to include updates on the verification and receipt issues discussed in this memorandum.

Please contact our office if you have any questions regarding this memorandum.

cc:
(1) Director, Collection Policy (SBSE)
(2) Division Counsel (SBSE)
(3) Special Counsel to the National Taxpayer Advocate